

1 Michael J. McQuaid (Bar No. 95871)  
2 CARR, McCLELLAN, INGERSOLL,  
3 THOMPSON & HORN  
4 Professional Law Corporation  
5 216 Park Road  
6 P.O. Box 513  
7 Burlingame, California 94011-0513  
8 Telephone: (650) 342-9600  
9 Facsimile: (650) 342-7685  
10 mmcquaid@carr-mcclellan.com

11 Attorneys for Creditors  
12 ALLAN AND BEVERLY SEBANC,  
13 Trustees of the Sebanc Family Trust

14 UNITED STATES BANKRUPTCY COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 SAN FRANCISCO DIVISION

17 DEMMIE BALAURO ACOSTA,

18 Debtor.

Case No. 09-32339 DM

Chapter 11

OBJECTION TO DEBTORS' MOTION TO  
EXTEND TIME DURING WHICH ONLY  
DEBTORS MAY FILE A PLAN

Date: December 11, 2009

Time: 10 a.m.

Room: Courtroom 22

19 Allan and Beverly Sebanc, Trustees of the Sebanc Family Trust ("Sebanc"), creditors of  
20 the Debtor, hereby object to the Debtors' Motion to Extend Time During Which Only Debtors  
21 May File a Plan (the "Motion").

22 INTRODUCTION

23 Sebanc continues to be concerned at the lack of progress in this case and Mrs. Acosta's  
24 lack of knowledgeable concerning assets of the estate and the estate's financial status and  
25 transactions.<sup>1</sup> From her testimony at meetings of creditors it appears that Mrs. Acosta only has  
26 extremely limited knowledge of the Debtors' assets and liabilities, of the estate's income and  
27 expenses, or of events occurring in the case. For example, when asked at the meeting of creditors

28 <sup>1</sup> The facts cited in this Objection are set forth in the accompanying Declaration of Michael J. McQuaid.

1 about the amount of interest accruing on a monthly basis on the Debtors' secured obligations she  
2 could not respond. Since the secured obligations total over \$32 million the monthly accrual  
3 amount is extremely important to be aware of. Further, Ms. Acosta could not respond to  
4 questions concerning the filed Monthly Operating Reports. For example, when asked about her  
5 September 2009 Monthly Operating Report showing \$488,043 in Post Petition Liabilities Mrs.  
6 Acosta did not know about it and could not respond. (It was indicated that the Monthly Operating  
7 Report may be in error. However, no corrected operating report has been filed.) Or, when asked  
8 why the bank statement did not reflect the deposit of September rents into her DIP account,  
9 Mrs. Acosta did not know. In addition, when asked at the last meeting of creditors about an offer  
10 that was made on the Fitch/Innes property she was not aware that an offer had been made despite  
11 the fact that it had been. Creditors' loss of confidence in the debtor's management has been cited  
12 as a factor in not extending the exclusivity period. See, *In re All Seasons Industries, Inc.*, 121  
13 B.R. 1002, 1006 (Bankr. N.D. Ind. 1990).

14 Sebanc is further concerned about the lack of progress in the case. For example,  
15 properties are not being promptly listed for sale. Despite the passage of nearly 4 months, Debtors  
16 still do not have a marketing strategy and, except for one property (which was listed in late  
17 October) none of the properties are listed for sale. Debtors admit that properties need to be sold  
18 but nothing is being done. (In the Motion Debtors state that other properties will be listed but no  
19 further applications to employ real estate brokers have been filed by the Debtors.) Sebanc fears  
20 that an extension of the exclusivity period will enable the further lack of progress in the cases.

#### 21 ARGUMENT

22 Debtors seek to extend the exclusivity period for 6 months, to June 15, 2010, under  
23 Section 1121(d)(1) but have not demonstrated the requisite "cause" for the requested extension.  
24 Debtors bear the burden of establishing cause for the extension. See, *In re Hoffinger Industries,*  
25 *Inc.*, 292 B.R. 639, 643 (8<sup>th</sup> Cir. BAP 2003) ("...the party requesting an extension of the  
26 exclusivity period has the burden of establishing good cause.")

27 First, Debtors have not met their burden since they have not provided any admissible  
28 evidence in support of the Motion. Consequently, the Motion cannot be granted.

1 Even had they provided admissible evidence, the factors supporting "cause" do not exist  
2 in this case. The following factors were cited with approval by the BAP in *In re Henry Mayo*  
3 *Newhall Memorial Hosp.*, 282 B.R. 444 452 (9<sup>th</sup> Cir. BAP 2002): (1) whether it is a first  
4 extension; (2) whether it is a complicated case; (3) whether the case had not been pending for a  
5 long time, relative to its size and complexity; (4) whether the debtor did not appear to be  
6 proceeding in bad faith; (5) whether debtor had improved operating revenues so that it was paying  
7 current expenses; (6) whether debtor had shown a reasonable prospect for filing a viable plan; (7)  
8 whether debtor was making satisfactory progress negotiating with key creditors; (8) whether  
9 debtor did not appear to be seeking an extension of exclusivity to pressure creditors; and (9)  
10 whether debtor was not depriving the Committee of material or relevant information.

11 This is not a complicated case. Although there are a number of properties it is evident that  
12 the Debtors cannot support debt service and so they must be sold.<sup>2</sup> However, the Debtors have  
13 only listed one of them in the almost 4 months that this case has been pending. The Debtors  
14 merely are "in discussions" with brokers and have not determined list prices or properties to be  
15 listed. Meanwhile, interest on the \$32 million of secured debt has accrued and is continuing to  
16 accrue and hundreds of thousands of dollars in real property taxes have accrued and are  
17 continuing to accrue. Those accruals are having a severe negative impact on the assets of the  
18 estate.

19 The case has been pending for close to four months but there has been no significant  
20 progress toward a plan. Expiration of exclusivity may promote meaningful negotiations and  
21 progress toward a plan.

22 Although not likely to amount to bad faith the Debtors' conduct in the cases has been  
23 below that expected of a competent debtor in possession. For example, Monthly Operating  
24 Reports have not been timely filed. Indeed only one operating report has been filed and the  
25 Debtors admit it needs to be corrected but Debtors have not done so. Mrs. Acosta is not  
26 knowledgeable concerning assets of the estate nor of the estate's financial status and transactions.

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27  
28 <sup>2</sup> Sebanc questions the accuracy of the Debtors' valuations of the properties and believes those values need to be tested by exposing the properties to the market, which Debtors have failed to do.

1 Mrs. Acosta was not even aware that an offer had been made on the estate's largest property.

2 Since only one Monthly Operating Report has been filed (which Debtors admit is  
3 inaccurate) it cannot be determined whether Debtors have improved operating revenue since the  
4 filing. However, even if Debtors' cash flow has improved it pales in comparison to the interest  
5 and real property tax accruals on the Debtors' real properties.

6 No specifics are given as to a viable plan. Although the Debtors have mentioned various  
7 scenarios, there has been no evidence that the Debtors can file a viable plan. For example, at the  
8 meeting of creditors Debtors stated that they are planning to have the Fitch/Innes property re-  
9 zoned prior to listing it for sale. However, Debtors admitted that this would take significant time  
10 to accomplish and that they will need \$1-2 million to pay for professional fees alone to do so.  
11 When asked where this money will come from Mrs. Acosta did not know. The value of the  
12 Fitch/Innes property in this economic environment is uncertain but what is certain is that the loans  
13 and taxes secured by the property accrue at staggering amounts. In the six month period that  
14 Debtors are requesting these accruals will exceed \$1.0 million. Given this and the likely time  
15 needed to market and sell the property, the Fitch/Innes property in particular needs to be listed as  
16 soon as possible but Debtors have not done so and are not intending to do so.

17 Debtors only mention commencement of preliminary discussions with La Jolla Bank. No  
18 specifics are given. No prospects of an agreement are given. No mention is made of discussions  
19 with other creditors.

20 Pressure to creditors is being applied by the accrual and non-payment of interest and  
21 property taxes. In the Motion Debtors state that over the next several months the Debtors through  
22 sales will be able to "restore the estate to a position of having positive cash flow" but again, no  
23 specifics are provided. Given the huge monthly accruals it is wildly optimistic that the Debtors  
24 can accomplish this without selling most, if not all, of the properties. However, there will be no  
25 sale unless the properties are listed and as of today, Debtors have only listed one property for sale.

26 Debtors have failed to provide relevant and material information to creditors. Only one  
27 Monthly Operating Report has been filed and Debtors have admitted that it is not accurate and  
28 needs to be corrected but have not done so.

1 Finally, the denial of the motion will not prevent the Debtors from proposing a plan. If it  
2 is fair and viable it will be accepted by the creditors. Moving the case forward is the  
3 "transcendent consideration" in deciding whether to extend the exclusivity period. *Newhall*  
4 *Memorial Hosp.*, 282 B.R. at 453. Here, expiration of exclusivity may promote meaningful  
5 negotiations and progress toward a plan rather than the very limited progress that has been made  
6 to date.

7 Based on the foregoing, Sebanc requests that the Debtors' Motion be denied.

8  
9 Dated: December 4, 2009

CARR, McCLELLAN, INGERSOLL,  
THOMPSON & HORN  
Professional Law Corporation

11  
12 By: Michael J. McQuaid  
13 Michael J. McQuaid  
14 Attorneys for Creditors  
ALLAN AND BEVERLY SEBANC,  
Trustees of the Sebanc Family Trust